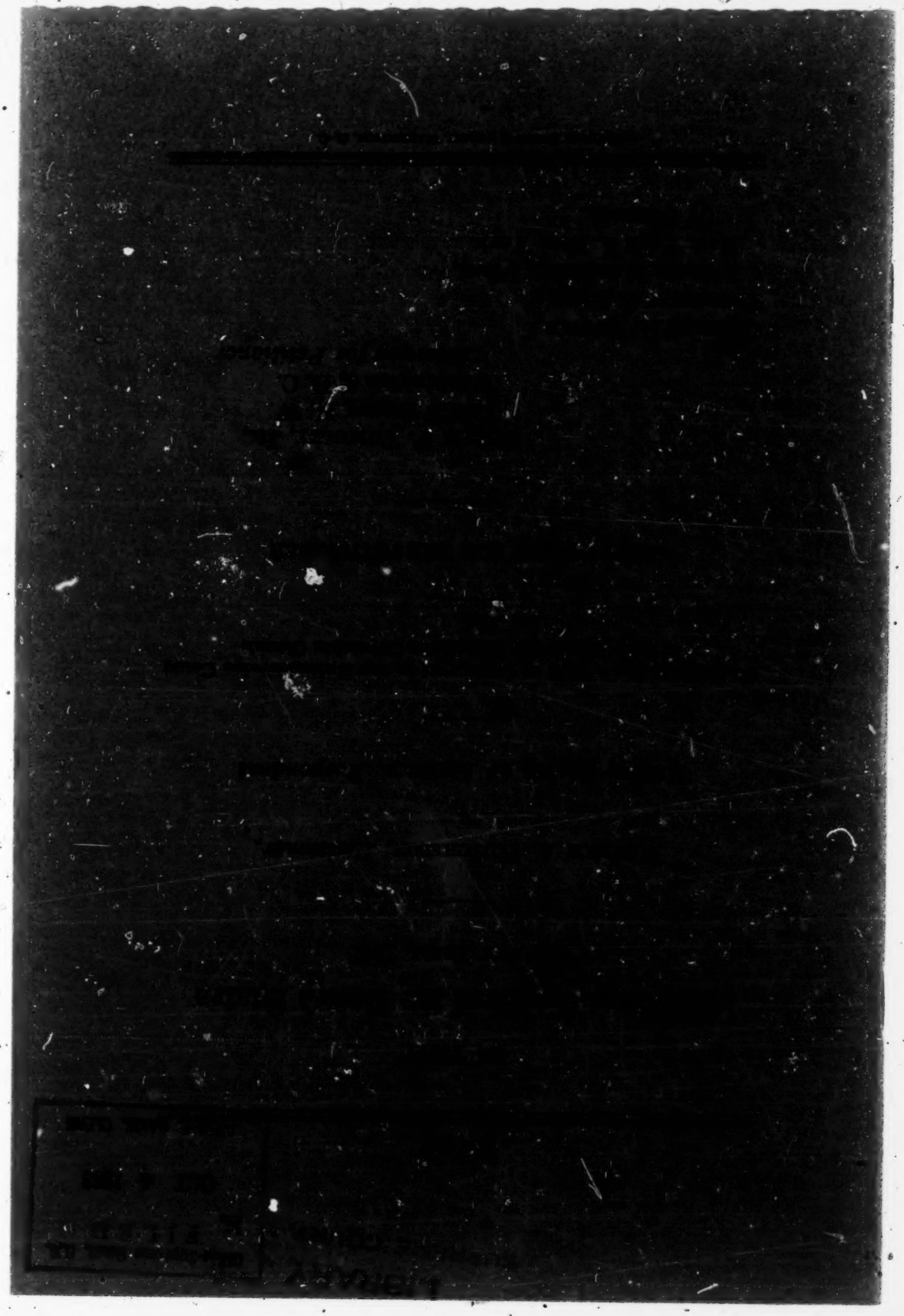

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 416

MAURICE A. HUTCHESON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONER

I.

Petitioner desires to call to the attention of the Court the attached copy of an order of the Court of Appeals, en banc; entered September 27, 1963, in respect of petitioner's petition for rehearing filed in said Court on July 11, 1963, which was denied by a

panel of said Court on August 1, 1963, as set forth in the petition herein.

Said order does not, we submit, affect the posture or merits of the case; however, it is hereto attached for the information of the Court.

II.

1. There is no merit in the government's contention (Brief in Opposition pp. 6-7) that the appeal to the Court of Appeals was untimely in respect of the petitioner's motion under Rule 12(b). As this point was not discussed in the petition, it is necessary for petitioner to deal with it here.

The basic error in the government's position results from its viewing the proceedings in the Court of Appeals as if there had been *two* appeals, whereas there was but one. That appeal was taken within 10 days after the controversy, in each of its aspects, was finally disposed of in the District Court. This was a single appeal which brought up for review two orders of the District Court as to which in each case error was asserted.

The facts bearing on the issue, detailed on pages 13 to 15, inclusive, of the petition herein, are as follows:

When the Court of Appeals' order of affirmance (in lieu of mandate) was presented in the District Court on July 19, 1962, that court, without objection by government counsel, entered an order which stayed the judgment and commitment until *both* pending motions (i.e., the motion under Rule 12(b) and that under Rule 35) were heard and disposed of. This order remained

in effect until February 1, 1963, when Judge Pine, after hearing, denied the Rule 35 motion.

The Rule 12(b) motion, it is true, had been denied on January 10, 1963, but the other motion then remained to be argued and disposed of, and, concurrently with the filing of his order denying the former motion, Judge Curran directed the Assignment Commissioner to set down the second motion for argument. (See Joint Appendix, Docket Entries, p. vi, entries for January 10, 1963). This was done, and the second motion was heard and disposed of by Judge Pine on February 1, 1963.

Judge Pine's order, under the provisions of the July 19, 1962 stay order, terminated the stay and "triggered" Judge Curran's order of January 10, 1963 as well as the judgment and commitment. Hence final disposition of the entire controversy in the District Court was effectuated by the denial of the Rule 35 motion on February 1, 1963. Petitioner filed notice of appeal on February 4, 1963, specifying therein both the orders of January 10 and February 1, 1963 as the orders appealed from.

If notice of appeal had been filed within 10 days after the denial of the Rule 12(b) motion, such filing would have divested the District Court of jurisdiction of the case, and the pending Rule 35 motion; and any order on that motion after such filing could not be treated as validly entered or appealed from. *Weiss* v. *Hanna*, 212 F.(2d) 711 (2nd Cir., 1963; cited with concurrence by the government in its Brief in the Court of Appeals, p. 6, footnote 1). Moreover, the July 19, 1962, stay order would have continued in force. Hence the controversy in the District Court would not have been completely and finally disposed of.

The order denying the Rule 35 motion was, therefore, the order which finally and completely disposed of the case in the District Court.

The petitioner accordingly followed the proper course in filing the notice of appeal when the controversy at the District Court level was completely and finally disposed of by rulings upon both motions. Such procedure is fully in accord with many decisions of this Court from early to most recent times:

"Though the merits of the cause may have been substantially decided, while anything, though merely formal, remains to be done, this Court cannot pass on the subject. If from any intermediate stage of the proceedings an appeal might be taken to the Supreme Court, the appeal might be repeated to the great oppression of the parties." Mr. Ch. J. Marshall, *Life and Fire Ins. Co.* v. *Adams*, (U.S.) 9 Pet. 575, 602. "We think that the decree is not a final decree, and that this Court has no jurisdiction of the appeal. The decree is not final, because it does not dispose of the entire controversy between the parties." *Keystone Manganese, Inc.* v. *Martin*, 332 U.S. 91, 93. "It is the settled practice of this Court, and the same in the King's Bench in England, that the writ will not lie until the whole of the matters in controversy in the suit below are disposed of . . . The cause is not to be sent up in fragments." *Holcombe* v. *McKusick* (U.S.) 20 How. 552, 554.

"But piecemeal appeals have never been encouraged", *Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254, 258. "Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what practical purposes is a single controversy, set itself against

enfeebling judicial administration.'" *Cobbledick* v. *U. S.*, 309 U.S. 323, 325. "The foundation of this policy is not in merely technical conceptions of 'finality'. It is one against piecemeal litigation. 'The case is not to be sent up in fragments' . . . *Luxton* v. *North River Bridge Co.*, 147 U.S. 337, 341." *Catlin* v. *U. S.*, 324 U.S. 229, 233, 234. "The long established rule against piecemeal appeals in federal cases and the overriding policy considerations upon which the rule is founded have been repeatedly emphasized by this Court. See e.g., *Di Bella* v. *U. S.*, 369 U.S. 121; *Carroll* v. *U. S.*, 354 U.S. 394; *Cobbledick* v. *United States*, 309 U.S. 323. The standards of finality to which the Court has adhered in habeas corpus proceedings have been no less exacting. See, e.g., *Collins* v. *Miller*, 252 U.S. 364. There the Court said that the rule as to finality requires that the judgment to be appealable should be final not only as to all parties, but as to the whole subject matter and as to all the causes of action involved. 252 U.S. at 370." *Andrews* and *Donovan* v. *U. S.*, __ U.S. __, 10 L. ed. 2d 383, 83 S. Ct. __, decided May 20, 1963.

The facts on this issue in this case afford no excuse for having the "litigants bedeviled and confused by the judicially created fog of 'finality'". Black, J., dissenting in *Federal Trade Commission* v. *Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 217.

Nor is there anything in *Federal Trade Commission* v. *Minneapolis-Honeywell R. Co., supra*, cited in the government's Brief in Opposition (p. 7), that has any bearing whatsoever on the situation presented here. That case concerned a question of timely filing of a petition for *certiorari*, which, unlike the filing of a notice of appeal, does not divest the jurisdiction of

the court whose judgment or order is sought to be reviewed, which is divested only when and if *certiorari* is granted. And the holding in the case was simply that an amendment by the Court of Appeals of a prior judgment finally settling the sole issue litigated before the Court did not start the running of a second 30-day period for purposes of filing a petition for *certiorari*, where the amendment concerned only collateral matters which were not in controversy in the appeal.

A final word as to the government's discussion of this point, in its aforesaid Brief, p. 7: The government suggests, for the first time in this litigation, that the petitioner might have had a remedy for his conviction under an invalid indictment under Rule 35 or in the nature of a writ of error *coram nobis*, rather than under Rule 12(b). Petitioner, for reasons fully discussed in the petition herein, believes Rule 12(b) clearly afforded an appropriate remedy. But, in any event, this Court has many times held in criminal cases that the substance is controlling, not the form of the remedy invoked. Thus, in *Heflin* v. *United States*, 358 U.S. 415, cited on page 7 of the government's aforesaid Brief, this Court granted relief under Rule 35, although Heflin had invoked a remedy under 28 U.S.C., Section 2255.

2. Omitted from the government's argument on the merits of petitioner's motion under Rule 12(b) (Brief in Opposition pp. 7-9), is any discussion of this Court's decisions in *Grumman* v. *United States*, 370 U.S. 288; *Silber* v. *United States*, 370 U.S. 717; and *Hartman* v. *United States*, 370 U.S. 801. These decisions, vital to the issues raised by the petition, are not even referred to in the argument. Moreover, the Statement of the case, upon which the argument is predicated, omits

any mention of these decisions, referring only to the earlier decision in *Russell* v. *United States*, 369 U.S. 749.

These ignored decisions are, of course, highly relevant to the issues raised by the petition, and crucial to the case.

Failure to mention or discuss them is particularly significant in the light of the fact that they were decided *after* petition for rehearing was filed in this Court by petitioner, following affirmance of the judgment of conviction on May 14, 1962, and hence they were not and could not have been mentioned or discussed in the petiton. The first of these cases, *Grumman*, was decided on June 18, 1963, and the other two on the last day of the term, June 25, 1962, the day on which the petition for rehearing was denied.

Furthermore, the omission to refer to or discuss these decisions is incomprehensible in view of the new light thrown on the cases by petitioner's research into their records. See Petition for Certiorari, pp. 12, 19-21, inclusive.

In short, the government's argument simply cannot be squared with the decisions of this Court in Grumman, Silber and Hartman.

As we have shown, Grumman, Silber and Hartman questioned the validity of the indictment at a time when "the definitive ruling on the question of law had not crystallized" (*per* Douglas, J., in *Sunal* v. *Large*, 332 U.S. 174, 181), but after such crystallization in the jailing of Barenblatt, they waived and abandoned the point. Yet the change in the state of the law in *Russell* was deemed good cause for reversing their convictions. Such reversals, despite the waivers, demonstrate that

this Court does not regard the invalidity of the indictments as merely "a technical defect", as the governments asserts (Brief in Opposition, p. 9). Moreover, Hartman, no doubt conscious of his voluntary waiver, made no mention in his Supplement to Petition for Certiorari of any motion in the District Court, and relied solely on the failure of the indictment to charge an offense. See the Petition for Certiorari herein, Appendix B, pp. 5a-7a.

On the other hand, petitioner was indicted *after* the law had crystallized in the jailing of Barenblatt, and he made no conscious waiver. He simply omitted to "engage in the futile exercise" of filing a frivolous motion which was without warrant in the state of the law as it had then crystallized by the long series of decisions culminating in *Barenblatt* v. *United States*, 360 U.S. 109. *See Milanovich* v. *United States*, 365 U.S. 551, 553.

In reviewing Silber's conviction, this Court gave no indication of reliance upon any "resulting prejudice to the conduct of his defense" (Brief in Opposition, p. 9), but reversed, despite his conscious waiver, because the error was "obvious", and "might otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

The same considerations apply to petitioner's case. He, like the others, has been denied the guaranteed right to indictment by a grand jury and the opportunity intelligently to exercise his guaranteed right to a trial by jury. (See Petition for Certiorari herein, pp. 27-8). And see also Joint Appendix, pp. 6-7, pointing out specific instances of resulting prejudice to petitioner.

3. As to the motion to reduce sentence, petitioner recognizes that under *Bryson* v. *United States*, 265 Fed. 2nd 9, 14 (C.A. 9), *certiorari* denied, 360 U.S. 919, the District Court's discretion as to sentence is not a subject for judicial review. Petitioner's contentions relate to the standards applied by the Court in connection with the exercise of the power, a matter which the Court examined into in *Bryson*. And the Court of Appeals for the District of Columbia has recently exercised appellate review in this area in *Leach* v. *United States*, No. 17,549, decided April 25, 1963, and as yet unreported.

CONCLUSION

For the reasons stated, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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